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No. 03-1540

In the Supreme Court of the United States

SONIA LAFONTAINE, AKA SONIA FROMME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed reversible plain error in admitting statements from the guilty plea allocution of petitioner's co-conspirator.

2. Whether the district court abused its discretion in excluding certain dictation tapes made by a co-conspirator.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not published in the *Federal Reporter*, but is reprinted in 87 Fed. Appx. 776.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2004. The petition for a writ of certiorari was filed on May 11, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit mail fraud and health care fraud, in violation of 18 U.S.C. 371; eight

counts of mail fraud, in violation of 18 U.S.C. 1341; one count of health care fraud, in violation of 18 U.S.C. 1347; two counts of witness tampering, in violation of 18 U.S.C. 1512(b)(3); one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and four counts of money laundering, in violation of 18 U.S.C. 1957. She was sentenced to 135 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-9a.

1. Petitioner and her husband, Arthur Kissel, owned and operated a Manhattan cosmetic surgery clinic, LaFontaine-Rish Medical Associates (LRMA). The evidence at trial showed that, from 1994 to 1998, petitioner and Kissel executed a massive health insurance fraud scheme. Gov't C.A. Br. 3-5.

LRMA was named for petitioner and Dr. Benito Rish. Rish spent little time at the clinic, which was run by petitioner and Kissel. Dr. Joseph Spektor worked part-time at the clinic. Petitioner and Kissel caused LRMA to submit hundreds of fraudulent health care claims that: (1) falsely billed various cosmetic procedures that were not covered by insurance as medically necessary procedures that were covered by insurance; (2) falsely represented that certain medical procedures performed by petitioner, who had no medical license or formal medical training, had been performed by licensed doctors who in fact had not met the patients involved; and (3) inflated bills to obtain reimbursement for services that had not been performed. Gov't C.A. Br. 3-20.

Rish pleaded guilty before petitioner's trial. At his plea hearing, Rish stated that he worked at LRMA from 1994 to 1997; that he knew that petitioner and others were submitting claims for procedures that were not covered by insurance; that he signed documents

that certain procedures had been performed when he knew that they had not been performed; and that those documents were submitted to insurance companies for reimbursement. At petitioner's trial, the government presented a redacted version of Rish's plea allocution hearing to the jury. The redacted version removed all references to petitioner and Kissel. The district court instructed the jury that it could consider Rish's statements as proof of the existence of the charged conspiracy and Rish's role in it, but not as evidence that petitioner participated in the conspiracy. Gov't C.A. Br. 35-37.

Five days after the deadline for producing documents and less than one month before trial, petitioner provided the government with copies of dozens of audio tapes that purported to be the dictations of various LRMA doctors, including Spektor. Spektor declined to testify at trial, asserting his Fifth Amendment privilege against compelled self-incrimination. Margarita Brice, an LRMA employee who was responsible for transcribing dictation tapes from doctors, testified that she observed Spektor dictating on numerous occasions, and that rather than dictating during the procedure or from memory, he merely read from the same paper "over and over again." Brice also testified that petitioner ordered Spektor to increase the number of lesions he allegedly removed. In addition, Brice stated that the doctors used miniature-sized cassettes for dictation, not regular-sized tapes like the ones provided by petitioner to the government. Gov't C.A. Br. 50-51.

During cross-examination of Brice, petitioner sought to admit the regular-sized tapes, arguing that they were admissible as business records and that they showed that a doctor was present during patient surgery. The government objected on the ground that the

tapes were not made contemporaneously with the procedures and that there was evidence that they had been created after the fact to conceal the fraud. The district court ruled that there was "sufficient doubt" concerning the authenticity of the tapes to justify their exclusion in the absence of testimony from Spektor. Further, in view of the possibility that the tapes were "created to establish some bogus evidence of what the doctor did," the court ruled that the business records exception to the hearsay rule did not apply. Gov't C.A. Br. 51-52.

2. The court of appeals affirmed. Pet. App. 1a-9a.

a. Petitioner argued that, because the government had used Rish's plea allocution testimony at trial, the government was required to immunize Rish to allow him to testify. Because petitioner had not raised that claim in the district court, the court of appeals addressed the claim under the plain error standard. The court of appeals found no plain error because its decisions had upheld the introduction of the plea allocutions of co-conspirators. Pet. App. 2a. The court explained that, absent extraordinary circumstances, there is no requirement for a court to order that a witness be granted immunity. The court further explained that the district court had no obligation to immunize Rish in this case because petitioner "did not demonstrate that Dr. Rish's testimony would have been exculpatory or otherwise material to her defense." *Id.* at 3a.

b. The court of appeals also rejected petitioner's claim that the district court had abused its discretion in excluding the dictation tapes. The court of appeals reasoned that, even if the doctors heard on the tapes were unable to testify about the tapes' authenticity, the district court had invited petitioner to use other means to authenticate the tapes, but she had failed do so. The court rejected petitioner's argument that the tapes

were admissible to impeach government witnesses. Reviewing that claim for plain error because petitioner had not made the argument in the district court, the court of appeals reasoned that the challenged tapes could not have been used for impeachment purposes because no hearsay statements of the doctors had been admitted at trial. Pet. App. 3a-4a.

ARGUMENT

1. Petitioner, relying on *Crawford* v. *Washington*, 124 S. Ct. 1354 (2004), contends (Pet. 8-13) that she is entitled to a new trial because the admission of Rish's plea allocution violated the Confrontation Clause of the Sixth Amendment. In *Crawford*, this Court held that the Confrontation Clause bars the admission of out-of-court statements that are "testimonial" in nature unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. 124 S. Ct. at 1374. The Court left "for another day efforts to spell out a comprehensive definition of 'testimonial,'" but it explained that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Ibid.* The Court also cited, as examples of "plainly testimonial statements" that had been admitted without the opportunity for cross-examination, Second Circuit decisions admitting plea allocutions to show the existence of a conspiracy. *Id.* at 1372 (citing, *inter alia*, *United States* v. *Petrillo*, 237 F.3d 119, 122-123 (2d Cir. 2000), and *United States* v. *Moskowitz*, 215 F.3d 265, 268-269 (2d Cir. 2000)); cf. Pet. App. 2a (citing *Petrillo* and *Moskowitz* in rejecting petitioner's claim).

There is no warrant for granting review of petitioner's claim under the Confrontation Clause. Peti-

tioner argued in the court of appeals that the admission of Rish's plea allocution required the government to immunize Rish so that he could testify at trial, and that the failure to grant Rish immunity caused a violation of, *inter alia*, petitioner's "confrontation rights." Pet. C.A. Br. 37-48; see Pet. App. 2a-3a. Insofar as petitioner adequately preserved the Confrontation Clause claim she now raises by arguing in the court of appeals that Rish should have been afforded immunity, petitioner did not raise that argument in the district court. As the court of appeals recognized, her claim therefore is reviewable only for plain error. *Id* at 2a.

To obtain review of a forfeited claim of error under Federal Rule of Criminal Procedure 52(b), petitioner must demonstrate that there has been (1) error, (2) that is plain, and (3) affects substantial rights. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Even if those conditions are met, the Court may exercise its discretion to notice a forfeited error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002) (quoting *Johnson*, 520 U.S. at 467).

The admission of Rish's plea allocution constituted error under *Crawford*, see 124 S. Ct. at 1372, 1374, and the error is plain at this stage of the proceedings, see *Cotton*, 535 U.S. at 632; *Johnson* 520 U.S. at 467-468. But the error did not prejudice petitioner and therefore did not affect her substantial rights. See *id.* at 466-467; *Olano*, 507 U.S. at 734 (error must have "affected the outcome of the district court proceedings").

First, the statements from Rish's plea allocution were redacted to omit any reference to petitioner, and the district court instructed the jury to consider the

redacted statements solely to demonstrate the existence of the charged conspiracy, not to show that petitioner was a member of the conspiracy. The jury presumably followed that instruction. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 394 (1999); *Shannon* v. *United States*, 512 U.S. 573, 585 (1994). Petitioner has not explained how cross-examination of Rish could have called into question the veracity of his plea allocution statements concerning the existence of the charged conspiracy. See Pet. App. 3a (court of appeals explains that petitioner "did not demonstrate that Dr. Rish's testimony would have been exculpatory or otherwise material to her defense"). Petitioner argued in the court of appeals that cross-examination of Rish would have enabled her to question the "implication that [she] was a knowing participant in the charged conspiracy," Pet. C.A. Br. 38, but the statements were admitted only to establish the existence of the conspiracy.

The error also did not seriously affect the fairness, integrity, or public reputation of the proceedings because the evidence against petitioner was overwhelming. See *Cotton*, 535 U.S. at 632-633. The government presented a substantial case against petitioner independent of Rish's plea allocution. The government introduced a wealth of documentary and physical evidence, including the false claims submitted by LRMA to insurance companies, bank records relating to money laundering, and fabricated patient records. The government also presented the testimony of 28 witnesses, including a number of LRMA patients, who explained how petitioner convinced them to participate in the fraud, performed procedures on them that were misrepresented in LRMA's insurance claims, and later induced them to lie to insurance fraud investigators and the FBI. In addition, the government

called three former employees of LRMA, who further explained how petitioner performed many of the procedures at LRMA, oversaw the billing process, and systematically altered patient files in an effort to support the fraudulent bills after she learned that the clinic was under investigation. See Gov't C.A. Br. 3-20.

Finally, petitioner's claim lacks prospective importance. After *Crawford*, the Second Circuit has ruled that the introduction of a co-conspirator's plea allocution as substantive evidence of guilt violates the Confrontation Clause where the co-conspirator is unavailable to testify at trial and there has been no opportunity for cross-examination. *United States* v. *McClain*, No. 02-1093, 2004 WL 1682768 (2d Cir. July 28, 2004). The government does not intend in future prosecutions to seek to introduce a co-conspirator's plea allocution in those circumstances.

2. Petitioner renews her contention (Pet. 14-16) that the district court erred in excluding the dictation tapes from evidence. That fact-bound issue does not warrant review.

A district court has wide discretion in determining whether an item of evidence has been properly authenticated. See, *e.g.*, *United States* v. *DeJohn*, 368 F.3d 533, 542 (6th Cir. 2004); *United States* v. *Alicea-Cardoza*, 132 F.3d 1, 3 (1st Cir. 1997). Federal Rule of Evidence 901(a) provides that the authentication requirement is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." A district court should admit a recording only if it is accurate, authentic, and trustworthy, see *DeJohn*, 368 F.3d at 542; *United States* v. *Panaro*, 266 F.3d 939, 951 (9th Cir. 2001), and an untrustworthy recording may be excluded, *United*

States v. *Jackson*, 208 F.3d, 633, 638 (7th Cir.), cert. denied, 531 U.S. 973 (2000).

The district court in this case did not abuse its discretion in excluding petitioner's dictation tapes for lack of authentication. Petitioner revealed the tapes to the prosecutors after the court's deadline for the parties to produce documents had passed. Brice testified that the original tapes were miniature cassettes, but petitioner sought to present full-sized tapes. Petitioner did not explain that her tapes were accurate copies of the originals or where she had obtained the tapes. Further, Brice testified that she did not begin transcribing tapes until the Summer of 1996, yet one tape presented by petitioner was purportedly from March 1996. See Gov't C.A. Br. 56. Further, as noted by the court of appeals, petitioner did not offer to authenticate the tapes by other means. Pet. App. 3a-4a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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